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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1939.

No. 481.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

MAGNOLIA PETROLEUM COMPANY (Appellant),

Respondent.

GUY A. THOMPSON, Trustee, MISSOURI-ILLINOIS RAILROAD COMPANY, Debtor (Appellee),

Petitioner,

vs.

THE OHIO OIL COMPANY (Appellant),

Respondent.

BRIEF

In Opposition to Supplement to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

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BRIEF

In Opposition to Supplement to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

I.

The decision of the Circuit Court of Appeals for the Seventh Circuit was subsequent to the decision here sought to be reviewed and is not yet final.

After respondents had prepared and had printed their brief in opposition to the petition for a writ of certiorari in this cause, they were served by petitioner with a sup-

plement to the petition for certiorari and a brief in support thereof.

The additional ground assigned as a basis for certiorari is that the decision sought to be reviewed is in conflict with the decision of the Court of Appeals for the Seventh Circuit, in the case of *The Carter Oil Company v. Welker*, handed down on November 6, 1939. It is apparent that the time for filing a motion for rehearing in that case has not yet expired and that the decision of the Court of Appeals for the Seventh Circuit may not be a final decision.

The decision here sought to be reviewed was handed down on August 29, 1939 (Tr. of R. 165), and the petition for rehearing was denied on September 26, 1939 (Tr. of R. 187). The decision in the *Welker* case was not handed down until November 6, 1939 (Supp. Pet. 2).

We respectfully submit that a comparison of the opinion in the present case with the opinion rendered by the Court of Appeals for the Seventh Circuit, in the case of *The Carter Oil Company v. Welker*, makes it very apparent that the Court of Appeals for the Eighth Circuit correctly followed the Illinois law of conveyancing, as well as the great weight of authority in other jurisdictions, and that the opinion in the present case is absolutely correct and that, if this Court should allow a certiorari, the judgment of the Court of Appeals for the Eighth Circuit would be affirmed.

In view of the fact that it is so plain that the law is correctly stated in the opinion in this present case, we feel that it is not inconceivable that, upon the filing of a petition for rehearing in the case of *The Carter Oil Company v. Welker*, the Court of Appeals for the Seventh Circuit will change its decision and hold that the deed in that case conveyed an easement and not a fee. Until the Court

of Appeals for the Seventh Circuit has passed upon the petition for a rehearing in the *Welker* case, or the time for filing such a petition has expired, no one can say that that Court will adhere to its present decision.

II.

The decision of the Circuit Court of Appeals for the Eighth Circuit, here sought to be reviewed, is not in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit, in the case of The Carter Oil Company v. Welker.

We contend most vigorously that the opinion of the Court of Appeals for the Eighth Circuit in this case is correct and that the decision of the Court of Appeals for the Seventh Circuit in the Welker case is incorrect. But, irrespective of that, the comments of the respective Circuit Courts of Appeal in both of these cases indicate clearly that the two courts recognized a difference in the deeds under consideration, and it is conceivable, therefore, that if the deed in the *Welker* case had used the same language as was used in the deeds in the present case, the Court of Appeals for the Seventh Circuit would have arrived at the same conclusion as was arrived at in the present case by the Court of Appeals for the Eighth Circuit.

In the *Welker* case the Court of Appeals for the Seventh Circuit held that the words "over and across," in the granting clause of the deed under consideration, refer to **the line** surveyed for the railroad track and **not to the land**, as in the present case. For the convenience of this Court, we briefly set forth the provisions of the deeds.

In the *Welker* case the granting clause was as follows:

"does hereby convey and warrant to Eastern Illinois

and Peoria Railroad Company, * * *, as and for its right of way, a strip of land One Hundred (100) feet wide, being Fifty (50) feet wide on each side of a line that has been surveyed and located across and upon the following described real estate, to-wit: Over and across the Northeast ¼ of the Northwest ¼ of Section Eighteen (18) Township Seven (7) North Range Three (3) East of the 3rd P. M. containing in all Three and Thirty-four Hundredths acres more or less" (Supp. Pet. and Br. 8).

The Court of Appeals for the Seventh Circuit, in commenting thereon, said:

"We do not agree with appellant's contention that the words 'over and across' written in longhand in the deed limited the conveyance to an easement. We think the words 'over and across' refer only to the surveyed line by which the exact location of the land was to be determined" (Supp. Pet. and Br. 13).

In the present case, the first deed conveyed:

"A strip of land for right of way for said railroad company sixty feet wide over and across the southwest quarter (¼) of the northeast quarter (¼) of section twenty (20)" (Tr. of R. 167).

And the granting clauses of the other two deeds in this case were substantially the same (Tr. of R. 167).

The Court of Appeals for the Eighth Circuit, in commenting upon the right-of-way deeds in this present case, said:

"Counsel for appellee argue that the words 'over and across' as used in the deeds, are descriptive of the words 'right of way,' and the words 'right of way' are descriptive of location by reference to the intended use of the 'strip of ground' to be conveyed. In this we think they err. The words 'over and across' are descriptive of the location of the 'strip of

ground,' and the words 'for right of way' describe the use or easement, that is, the estate intended to be conveyed. No other view can be reconciled with the language of the Rusler deed where there is added to the description the words, 'it being the strip of land over and across said above described tracts of land where the said Railroad is now located.' The Rusler deed was executed in 1898 and the other two in 1896. Apparently the railroad had not been located when the earlier deeds were made, but we perceive no sound reason why they should be construed differently" (Tr. of R. 176-177).

Therefore, as the deed in the case passed upon by the Court of Appeals for the Seventh Circuit, grants the following:

"as and for its right of way, a strip of land one hundred (100) feet wide, being fifty (50) feet wide on each side of a line that has been surveyed, and located across and upon * * *,"

and as the deeds in the present case grant the following:

"A strip of land for right of way for said railroad company sixty feet wide over and across, * * * *,"

it is apparent that the deeds are quite different. Consequently, the Court of Appeals for the Seventh Circuit might well have held in accord with the decision of the Court of Appeals for the Eighth Circuit had the wording of the deed involved in the *Welker* case been the same as the wording of the deeds in this case.

CONCLUSION.

Respondents respectfully submit that a writ of certiorari should not be issued in this case, first, because the decision of the Court of Appeals for the Eighth Circuit in this case is correct; second, because that decision is not in

conflict with the decision of the Court of Appeals for the Seventh Circuit in the *Welker* case, and, third, because of all of the grounds urged by respondents in their original brief herein.

Respectfully submitted,

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